Petition

81-1881

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. _____

EARL CHARLES,

Petitioner,

v.

F. W. WADE
AND
THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

In § 1983 actions, should police officers be accorded absolute immunity from liability for trial testimony given in the course of their official duties, or should they be clothed with the good-faith, qualified immunity that they possess for their official acts?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as Charles v. Wade, 665 F.2d 661 (5th Cir. 1982).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed was entered on January 11, 1982. This petition is filed within ninety days after entry of such judgment, as required by 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ... nor shall any State deprive any person of life, liberty, or property without due process of law ... ."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

Petitioner had served approximately three and one-half years under a sentence of death for murders he did not commit when he was released from prison after new evidence was discovered that supported his alibi defense. Following his release, petitioner filed an action under 42 U.S.C. § 1983 against the City of Savannah and F. W. Wade, a detective with the Savannah Police Department, alleging that defendants had concealed and falsified evidence that exculpated him of the crime and had initiated his prosecution without probable cause. More specifically, petitioner alleged that: (1) Detective Wade, the lead detective working the case, had falsified two eyewitness identifications of petitioner; (2) Wade had persuaded a witness, James Nixon, to testify falsely that petitioner had confessed to committing the Savannah murders, offering Nixon

freedom in exchange for this testimony; (3) Wade had withheld exculpatory evidence from the district attorney; and (4) Wade had perjured himself at the criminal trial when he, as lead detective, testified that petitioner's employer had stated that petitioner was not at work in Tampa on the day of the Savannah murders.

At trial, the district judge directed a verdict in favor of the City and, after deliberation, the jury returned a verdict for Wade. Petitioner appealed, arguing that the trial court: (1) abused its discretion in denying his motion to depose a person confined in a Florida prison, James Nixon, a witness crucial to petitioner's case; (2) erred in instructing the jury that it could not find in petitioner's favor on the basis of Detective Wade's alleged false testimony at petitioner's capital murder trial; and (3) erred in directing a verdict for the City of

Savannah.

The appellate court below agreed with petitioner's initial argument. It held that the district court abused its discretion in denying petitioner's motion to depose and, for that reason, reversed the court's judgment and remanded for a new trial. The court disagreed with petitioner's second contention. It held that in a § 1983 action, a police officer is absolutely immune from liability for testimony given as a witness in the course of his official duties. The court found it unnecessary to address petitioner's third argument respecting the City's liability. Judge Kravitch dissented from the portion of the court's opinion which accorded police officer witnesses absolute immunity. She instead advocated the position taken by the District of Columbia and Sixth Circuits; namely, a police officer who testifies at trial within the scope of

his duties possesses only a good-faith, qualified immunity from § 1983 liability.

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL COURT OF APPEALS BELOW HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

When the court below, deciding a question of first impression in the circuit, held that in a § 1983 action, a police officer is absolutely immune from liability for testimony given as a witness in the course of his official duties, it rendered a decision in conflict with the decisions of the District of Columbia and Sixth Circuit Courts of Appeal. Briggs v. Goodwin, 569 F.2d 10 (D.C.Cir. 1977), cert. denied, 437 U.S. 904 (1978); Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), vacated on other grounds, 424 U.S. 961 (1975), affirmed after remand, 540 F.2d 220 (6th Cir. 1976). The court's decision evidences an ever-widening split among the federal circuits on this question.

A majority of federal appellate courts considering this question have determined that absolute witness immunity applies to § 1983 actions. Briscoe v. LaHue, 663 F.2d 713 (7th Cir. 1981); Myers v. Bull, 599 F.2d 863 (8th Cir. 1979), cert. denied, 444 U.S. 901 (1980); Burke v. Miller, 580 F.2d 108 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979); Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978); Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976). With the addition of the Fifth Circuit's decision in the case sub judice, six circuits now favor extension of absolute immunity to § 1983 actions, while two circuits (plus Judge Kravitch per her dissenting opinion in the case sub judice) favor retention of good-faith, qualified immunity from § 1983 liability for actions undertaken by police officers within the scope of their duties.

Review of this issue is urgently needed. The extension of absolute immunity in § 1983 cases from private citizens to police officers should not be permitted to continue. Although private tortfeasors may deserve absolute witness immunity, even in § 1983 cases, such witness immunity should not be extended to police officers, because: (1) policy considerations favoring insulation of private citizen witnesses from liability do not apply with equal force to complaints charging constitutional violations against police officials for their false testimony, Briggs v. Goodwin, supra, Burke v. Miller, supra (Winter, J., concurring); (2) constitutional rights are uniquely important, requiring that special remedies be made available to protect them from official misconduct, Briggs v. Goodwin, supra, see Hilliard v. Williams, supra, 516 F.2d at 1349; (3) a qualified immunity provides suffi-

cient protection when there is no serious threat to the governmental decision-making process, Imbler v. Pachtman, 424 U.S. 409, 437 (1976)(White, J., concurring); and (4) the discretion a police officer exercises in testifying as a witness is certainly no greater than that which he exercises in making an arrest or conducting a search, Charles v. Wade, 665 F.2d 661, 668 (5th Cir. 1982)(Kravitch, J., dissenting).

II.

THE FEDERAL COURT OF APPEALS BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Like the Fifth Circuit Court of Appeals prior to its decision of the case sub judice, this Court has never considered the question of whether absolute common law witness immunity should be extended to allegations of unconstitutional conduct

against police officials. This immunity question, like many others already decided by this Court, is an important question of federal law.

This Court has determined that state prosecutors, judges and legislators are entitled to absolute immunity. Imbler v. Pachtman, supra; Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951). In contrast, it has determined that prison officials, school board members, state executive officials, and police officers are entitled only to a good-faith, qualified immunity. Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, supra. Moreover, the Court recently held that a municipality that violates a citizen's constitutional rights is not even entitled to good-faith immunity in a § 1983 action.

Owen v. City of Independence, 445 U.S. 622 (1980).

Prosecutors, judges and legislators have been granted absolute immunity only in order "to protect the decisionmaking process in which [the officials] are engaged." Imbler v. Pachtman, supra, 424 U.S. at 435. The Court has refused to clothe other state officials with absolute immunity, even though their duties require the exercise of much discretion and, in some circumstances, they would have been absolutely immune from liability at common law. See Imbler v. Pachtman, supra at 434; Charles v. Wade, supra, 665 F.2d at 668 (Kravitch, J., dissenting). Thus, the Court has extended only a good-faith, qualified immunity to prison officials, school board members, state executive officials and police officers, in order to minimize the prospect that the threat of liability will deter such officials

from exercising their discretion and performing their official duties without totally undermining the purpose of § 1983, which is to provide a remedy to persons deprived of their federal rights by the abuse of official power. Id.

Consistent with this rationale, review should be granted in this case to enable the Court to define the contours of this important immunity issue.

III.

THE FEDERAL COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Pierson v. Ray, supra stands for the proposition that a police officer is entitled only to good-faith, qualified immunity from § 1983 liability for actions undertaken within the scope of his duties. Nevertheless, the court below accorded a police officer absolute immunity simply

because the scope of his duties included testifying as a witness.

Only a good-faith, qualified immunity should extend to a police officer who testifies within the scope of his duties. In contrast, if an officer testifies to an event he observed off duty in his private capacity he should be accorded absolute immunity. There are two compelling reasons for limiting a police officer's immunity when he testifies in the course of his duties. First, "the discretion a police officers exercises in testifying as a witness is certainly no greater than that which he exercises in making an arrest or conducting a search." Charles v. Wade, supra, 665 F.2d at 668 (Kravitch, J., dissenting). "In fact, it is much less." Id. Second, the effect on the criminal justice system is no worse when a police officer is inhibited from fully testifying by the threat of liability than where a

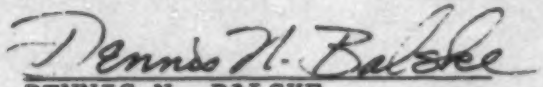
police officer is deterred from his investigative activities or his ability to make an arrest. Id. Thus, police officers should not be afforded a greater immunity from § 1983 liability when they testify at trial than when they perform any of their other duties. Id.

In conclusion, the ruling of the court below conflicts with this Court's decision in Pierson v. Ray, supra. Certiorari should be granted, both to correct the lower court's error and to prevent other courts from making the same mistake. Never again should a citizen of these United States have to spend over three and one half years in prison under a sentence of death for a crime he did not commit, only to have a court of law tell him: when the police officer whose perjury convicted you took the witness stand the law clothed him with absolute immunity!

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,



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COUNSEL OF RECORD FOR
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CERTIFICATE OF SERVICE

I, Dennis N. Balske, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 9 day of April, 1982, I did serve copies of this petition on Respondent, by placing in the United States Mail, first-class postage prepaid, three copies properly addressed to the counsel of record for Respondent, as follows:

J. B. Blackburn
Wiseman, Blackburn, Futrell
& Cohen
305-10 American Building
Savannah, Georgia 31412

I further certify that I have served all parties required to be served.

Dennis N. Balske
DENNIS N. BALSKE

Appendix

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ATTORNEY FOR PETITIONER

EARL CHARLES

v.

F. W. WADE
AND
THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH

Appeal from the United States District Court for the Southern District of Georgia.

Before MORGAN, RONEY and KRAVITCH, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Appellant Earl Charles had served approximately three and one half years of a sentence for murder when he was released from prison after new evidence was discovered that supported his alibi defense. Following his release, appellant filed an action under 42 U.S.C. § 1983 against the City of Savannah and F. W. Wade, a detective with the Savannah Police Department, alleging that the

defendants had concealed and falsified evidence that exculpated him of the crime and had initiated his prosecution without probable cause. At the conclusion of appellant's case, the district judge directed a verdict in favor of the City and, after deliberation, the jury returned a verdict for Wade. Appellant raises three issues on appeal. First, he argues that the district court abused its discretion in denying his motion to depose a person confined in a Florida prison, a witness alleged to be crucial to his case. Second, appellant argues that the court erred in instructing the jury that it could not find in appellant's favor on the basis of Detective Wade's alleged false testimony at appellant's criminal trial. Finally, appellant asserts that the court erred in directing a verdict of the City of Savannah. We agree with appellant's initial argument that the district court abused its discretion in denying his motion to depose and, for this reason, we reverse the court's judgment and remand for a new trial. We see no merit to appellant's second contention and find it unnecessary to address appellant's final argument.

I.

The parties offer divergent accounts and emphasize

different aspects of the facts that led up to appellant's arrest and prosecution. We will briefly summarize the salient facts of the case and will describe in detail only those facts that are necessary to an understanding of the issues on appeal.

On October 3, 1974, Max Rosenstein, the proprietor of a furniture store in Savannah, Georgia, and his son, Fred Rosenstein, were shot and killed during an armed robbery of the store. Myra Rosenstein, Max's wife and Fred's mother, and Macy Corcelius were present in the store when the murders occurred. The Savannah Police Department (hereinafter SPD) immediately began an investigation that led to appellant's indictment for the crimes on November 21, 1974. At that time appellant was confined in the Pasco County Jail near Tampa, Florida on charges unrelated to the Savannah murders. Following a hearing before the Circuit Court of Pasco County on December 9, 1974, the court granted extradition, and appellant was returned to Georgia.

At his criminal trial, appellant introduced the testimony of Robert Zachery, the manager of a service station in Tampa, who testified that appellant had been working at

the station on the day of the murders. Appellant also introduced time cards and payment vouchers from the station that verified his employment on October 3. In an effort to contradict appellant's alibi defense, the prosecution elicited testimony from Detective Wade that Robert Zachery had previously told him that appellant was not at work on the day of the murders. The prosecution then called James Nixon, an individual who had been arrested in Florida with appellant, who testified that while he and appellant were confined in the Pasco County Jail appellant confessed to Nixon that he had committed the Savannah murders. The jury evidently believed the prosecution's witnesses, for it returned a verdict finding appellant guilty of murdering the Rosensteins. Appellant was sentenced to death.

In February 1978 appellant through counsel filed a motion for new trial on the basis of newly discovered evidence that a Florida police officer had seen appellant working at the Tampa service station on the day of the murders. The District Attorney for Chatham County, Georgia dispatched his Chief Investigator to check out this new evidence and, after the investigator reported

that the evidence was consistent with appellant's alibi, the district attorney ordered that all witnesses be reinterviewed. After the completion of this investigation the district attorney made the decision not to oppose the motion for new trial and not to reprosecute appellant. Appellant was released from custody on July 5, 1978, over three years and seven months after his arrest and incarceration.

On June 20, 1979, appellant filed a complaint seeking damages under 42 U.S.C. § 1983 for violations of his Sixth and Fourteenth Amendment rights and under Georgia law for false imprisonment, malicious arrest, and malicious prosecution. In his initial complaint appellant named as defendants not only Detective Wade and the City of Savannah but also the Chief of the SPD and three other detectives employed by the department. Appellant subsequently voluntarily dismissed all state law claims and all defendants except Detective Wade and the municipality. Appellant made essentially four allegations against these two defendants: (1) that Detective Wade had falsified two eyewitness identifications of appellant, (2) that Wade had persuaded a witness, James Nixon, to testify falsely that appellant had confessed to committing

the Savannah murders, offering Nixon his freedom in exchange for this testimony, (3) that Wade had withheld exculpatory evidence from the district attorney, and (4) that Wade had perjured himself at the criminal trial when he testified that appellant's employer had stated that appellant was not at work on the day of the murders.

Our concern here is with three rulings issued by the district court before and during the trial of appellant's civil case. We will discuss each of these issues in turn.

II

[1] The first issue is whether the district court abused its discretion in refusing to permit appellant to depose James Nixon, who was then confined in a maximum security prison in Starke, Florida.

At appellant's 1975 criminal trial James Nixon testified for the prosecution that appellant had confessed committing the Savannah murders to him. Nixon also stated that the prosecution had not promised him anything in return for his testimony. However, during the course of discovery for the 1980 civil trial, appellant's counsel found a letter from Detective Wade and another detective with the SPD to the Governor of Florida requesting that

James Nixon be released from prison as a reward for his testimony at appellant's criminal trial. Counsel also found a letter from Nixon to Detective Wade suggesting that Nixon expected to be released from prison in return for his testimony.

Prompted by these discoveries, appellant's counsel sent an associate to interview Nixon at the Florida State Prison in November 1979. According to appellant,[1] at this interview Nixon stated that appellant had not confessed any murders to him and that Detective Wade had promised Nixon his freedom in return for his testimony. Appellant's counsel himself traveled to Florida on February 18, 1980 to further interview Nixon and to see if he would be willing to testify by deposition. At this interview Nixon revealed that Detective Wade had supplied him with the details of the murders. Nixon stated that Wade had come to the jail where he was being held and had questioned

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[1]This discussion of the letters and Nixon's alleged statements to appellant's counsel is taken from appellant's brief and from the memorandum presented to the district judge supporting appellant's motion to depose Nixon. By denying the motion to depose, the district court deprived appellant of any opportunity to establish whether Nixon had in fact changed his testimony. Therefore, for the purposes of this opinion, we will assume the truth of appellant's allegations.

him about certain statements appellant had made concerning the Savannah murders. Nixon told Wade that appellant had said nothing about any murders but had stated that he had robbed a furniture store in Savannah where he had once worked.[2] Wade then told Nixon that appellant had killed the owners of the furniture store. Nixon, taking Wade's word that appellant had in fact committed the murders, agreed to testify that appellant had confessed the Rosenstein murders to him in exchange for a guarantee that he, Nixon, would be released from prison. Wade agreed, and a bargain was struck.

At the conclusion of the interview, Nixon agreed to give a deposition. The next day, February 15, 1980, appellant's counsel contacted defense counsel to arrange a mutually agreeable time for the deposition. Two days later, on February 25, defense counsel informed appellant's counsel that under Rule 30(a), Fed. R. Civ. P., a court order would have to be obtained before such a deposition could be scheduled. The following day, some six weeks before the trial, appellant's counsel filed a motion seeking to

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[2]Appellant states in his brief that he never worked at Rosenstein's furniture store.

depose Jame Nixon. Defendants filed a response opposing appellant's motion. On March 4, 1980, the district court denied the motion on the basis that the discovery period had closed.

The federal Rules of Civil Procedure permit a party to introduce at trial the deposition of a witness if the witness is more than 100 miles from the place of trial or is unable to appear because of imprisonment. Fed. R. Civ. P. 32(a)(3)(B) & (C). The witness James Nixon satisfied both of these conditions: he was incarcerated in a prison located more than 100 miles from Savannah. Nevertheless, appellant was not automatically entitled to depose the witness since, under Rule 30(a), "[t]he deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes."

When appellant sought the court's leave to depose Nixon, the court denied permission on the basis that the discovery period had closed. This was clearly an inappropriate reason for denying appellant's motion to depose. Although the discovery period had indeed closed at the time appellant made his motion, the requested deposition would not have been taken for purposes of discovery but

as the testimony of a witness unavailable for trial. Appellant's motion underscored this distinction by informing the court that the deposition would "not be taken for discovery purposes, but in lieu of Mr. Nixon's live testimony at trial." The distinction is a valid one. Appellant was not seeking to discover Nixon's testimony — appellant knew what Nixon had to say — but was seeking a means for introducing Nixon's testimony at trial. A party to a lawsuit obviously is entitled to present his witnesses. The fact that the discovery period had closed had no bearing on appellant's need, or his right, to have the jury hear Nixon's testimony. We hold that the court clearly erred in denying appellant's deposition motion on the ground stated in its order.

[2] Appellees point out that had the court allowed Nixon to testify by deposition that appellant had never mentioned the Savannah murders, appellees would have immediately impeached his testimony by introducing Nixon's many previous statements that appellant had confessed the murders to him. Appellees also emphasize that appellant offered no corroboration of Nixon's alleged testimony. Neither argument provides a justification for

excluding Nixon's testimony. Whether Nixon's previous inconsistent statements or the absence of any corroborative evidence undercut the value of his deposition testimony was a question for the jury, not for the court. By denying appellant the right to depose Nixon, the court in effect deprived the jury of any opportunity to make this credibility judgment. The court offered no valid reason for denying the jury access to Nixon's testimony, and appellees have failed to provide one here.

Finally, we note that permitting the deposition to be taken would not have prejudiced appellees in any way. Appellant filed his motion more than six weeks prior to trial, and therefore appellees had ample time to select a convenient date and to prepare for the deposition. At oral argument appellees suggested that if the court had allowed the deposition, they would have required additional time to round up the witnesses they would have needed to refute Nixon's testimony. Appellees never made this argument to the district court. Even if they had, the appropriate remedy would have been to postpone the trial, not deny the deposition and deprive appellant of testimony critical to his case.

III.

[3] The next issue for our consideration is whether the district court erred in instructing the jury that it could not premise liability on Detective Wade's alleged false testimony at appellant's murder trial. The basis for the court's instruction was its conclusion that a police officer who testifies as a witness in a judicial proceeding should be accorded absolute immunity from a civil damages suit brought under 42 U.S.C. § 1983. The question of witness immunity under § 1983 is one of first impression in this circuit. After carefully considering the precedents and the policies supporting witness immunity, we adopt the majority position that a witness is entitled to absolute, unqualified immunity from liability under § 1983 for his trial testimony. We therefore affirm the district court's ruling on this question.

The appropriate analysis for evaluating an immunity defense to a § 1983 "constitutional tort" action was outlined by the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). There, in considering the scope of a state prosecutor's liability under § 1983 for an alleged unlawful prosecution of a

criminal defendant, the Court recognized that it had previously established that "§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Id.* at 418, 96 S. Ct. at 989. From this basic premise the Court devised a two-part test for determining the validity of an immunity defense. First, the court must inquire into the immunity historically accorded the claimant at common law and the interest behind it. *Id.* at 421, 96 S. Ct. at 990. Next the court must determine whether the considerations of public policy that underlie the common law rule likewise countenance absolute immunity from § 1983 liability. *Id.* at 424, 96 S. Ct. at 992. Utilizing this analysis, the Court held that a state prosecutor enjoys an absolute immunity from liability under § 1983, even though such immunity leaves the genuinely wronged defendant with no civil redress against a prosecutor who knowingly used perjured testimony or deliberately withheld exculpatory information. The Court's holding was consistent with its previous cases extending absolute immunity to legislators, *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), and to judges, *Pierson v. Ray*, 386 U.S. 547, 87 S.

Ct. 1213, 18 L. Ed. 2d 288 (1967), and was consistent with the cases granting a qualified immunity to policemen, *Pierson v. Ray*, *supra*, and to school officials, *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975). In each of these cases the Court had adopted essentially the same immunity under § 1983 that had prevailed at common law.[3]

It is clear that at common law a witness was absolutely protected from any suit arising from his testimony in a judicial proceeding. *Myers v. Bull*, 599 F. 2d 863, 866 (8th

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[3]The result of the Court in one case, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), may be viewed as a departure from the common law, although it did not so state. In holding high executive officials subject to qualified immunity, *Scheuer* may have been a withdrawal from the absolute immunity at federal common law of *Barr v. Mateo*, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed 2d 1434 (1959), and *Spalding v. Vilas*, 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780 (1886). But even that federal common law was of relatively recent origin compared to the legislative and judicial immunities with roots in the seventeenth century: "The [absolute] executive privilege in defamation actions would appear to be a judicial creature of less than 65 years' experience." *Barr v. Mateo*, 360 U.S. 564, 582, 79 S. Ct. 1335, 1345, 3 L. Ed. 2d 1434 (1959) (Warren, C. J., dissenting opinion). [The majority] highlights *Scheuer v. Rhodes*, *supra*, as showing how the Supreme Court departs from the immunities of the common law when a constitutional right is involved. In fact, as noted, *Scheuer* is the only Supreme Court case that does so, (without expressly acknowledging it either), and, moreover, as noted, that common law was of recent origin.
Briggs v. Goodwin, *supra*, 569 F. 2d 10 at 50 (Wilkey, J., dissenting).

Cir. 1979), *cert. denied*, 444 U.S. 901, 100 S. Ct. 213, 62 L. Ed. 2d 138 (1980); *Brawer v. Horowitz*, 535 F. 2d 830, 837 (3d Cir. 1976), even if his testimony was prejured and malicious. 1 F. Harper & F. James, The Law of Torts, § 5.22 at 423-24 (1956); W. Prosser, The Law of Torts, § 114 at 777 (4th ed. 1971). The witness' immunity — like the immunity accorded to judges and prosecutors — was based upon his status as an essential participant in the judicial process:

> The function of witnesses is fundamental to the administration of justice. The court's judgment is based on their testimony and they are given every encouragement to make a full disclosure of all pertinent information within their knowledge.

1 Harper & James, *supra* at 424. The common law perceived that the policy of encouraging a witness' free and uninhibited cooperation in the fact-finding process would best be served by insulating the witness from the threat of civil liability for his testimony. Without such immunity, the witness might gauge each of his statements in terms of the possibility of his own personal liability and, therefore, lack the candor and freedom of expression considered essential to the proper functioning of the judicial process. *See* Veeder, Absolute Immunity in Defamation: Judicial

Proceedings, 9 Colum. L. Rev. 463, 469 (1909). The resulting lack of any civil remedy against the dishonest witness "is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for they say." Prosser, *supra* at 778.

A majority of federal appeals courts to consider the question have held that the policies that underlie the common law rule of absolute witness immunity apply with equal force in a § 1983 action or its counterpart, a *Bivens*-type claim.[4] *Briscoe v. LaHue*, 663 F. 2d 713 (7th Cir. 1981); *Myers v. Bull*, 599 F. 2d 863 (8th Cir. 1979), *cert. denied*, 444 U.S. 901, 100 S. Ct. 213, 62 L. Ed. 2d 138 (1980); *Burke v. Miller*, 580 F. 2d 108 (4th Cir. 1978), *cert. denied*, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979); *Blevins v. Ford*, 572 F. 2d 1336 (9th Cir. 1978); *Bennett v. Passic*, 545 F. 2d 1260 (10th Cir. 1976). *Contra*, *Briggs v. Goodwin*, 569 F. 2d 10 (1977), *cert. denied*, 437 U.S. 904, 98 S. Ct. 3089, 57 L. Ed. 2d 1133 (1978); *Hilliard*

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[4] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). *Bivens* creates a cause of action against federal officials who act under color of their authority to deprive an individual of his constitutional rights. Section 1983 applies only to those officials who act under color of *state* law.

v. Williams, 516 F. 2d 1344 (6th Cir. 1975), *vacated on other grounds*, 424 U.S. 961, 96 S. Ct. 1453, 47 L. Ed. 2d 729 (1976), *on remand*, 540 F. 2d 220 (6th Cir. 1976). We agree with the majority position. No one can doubt that the need for full disclosure and free expression by witnesses is as important in a § 1983 "constitutional tort" action as in a suit at common law. Because the witness plays such an integral role in the fact-finding process, the reluctant or reticent witness would disserve the ends of justice regardless of the nature of the proceeding. Furthermore, it seems obvious that the prospect of personal liability under a civil rights claim would pose the same risk of intimidation as would the possibility of liability under the common law. It is the threat of money damages that produces the intimidating effect, and that threat is present under either theory of liability. Consequently, the policies underlying the common law rule of absolute immunity also justify providing a witness with immunity from § 1983 liability.

[4,5] We wish to emphasize that the immunity granted to witnesses — whether under the common law or under § 1983 — is not designed to benefit the dishonest witness but

to further the broad public interest in having witnesses who are unafraid to testify fully and openly. As Judge Learned Hand remarked in discussing a prosecutor's immunity,

> [a]s is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Gregoire v. Biddle, 177 F. 2d 579, 581 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950), *quoted approvingly in Imbler v. Pachtman, supra*, 424 U.S. at 428, 96 S. Ct. at 994. The protection accorded to the dishonest witness is simply a necessary consequence of a rule deemed essential to maintaining the integrity of the judicial process. Moreover, granting immunity from § 1983 liability does not provide witnesses with a license to testify falsely or "leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law." *Imbler v. Pachtman, supra*, 424 U.S. at 429, 96 S. Ct. at 994. The

witness who lies on the stand may be prosecuted for perjury. *Brauer v. Horowitz, supra*, 535 F. 2d at 837. This threat of criminal sanctions provides a sufficient deterrent against abuse of the witness privilege. *Burke v. Miller, supra*, 580 F. 2d at 111. "[I]f the risk of having to defend a civil damage suit is added to the deterrent against such conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self-censorship becomes too great." *Imbler v. Pachtman, supra*, 424 U.S. at 439 — 40, 96 S. Ct. at 999 (White, J., concurring).

IV.

[6] Finally, appellant argues that the district court erred when it directed a verdict in favor of the City of Savannah. In Part II of this opinion we held that the district court abused its discretion in denying appellant's motion to depose a person confined in a Florida prison. As a result of the court's error in refusing to permit the requested deposition, the court ruled on the City's motion for directed verdict without first having heard all the appellant's evidence. The possibility exists, therefore, that once the excluded deposition evidence is admitted at

trial, the court could be persuaded to reach a different result on the directed verdict issue. Because the district court must be given an opportunity to reconsider its ruling in the light of the additional evidence presented by appellant, we find it unnecessary to express any opinion on the propriety of the court's earlier decision to grant the motion for directed verdict.

V.

Because we find that the district court abused its discretion in denying appellant's motion to depose a person confined in a Florida prison, we reverse the court's judgment and remand for a new trial. Following the introduction of appellant's evidence, including the deposition testimony of James Nixon, the court should reconsider its order directing a verdict for the City of Savannah.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KRAVITCH, Circuit Judge, concurring in part, dissenting in part:

I concur in Parts I, II, IV, and V of the majority opinion. I respectfully dissent, however, from Part III, which holds that in a § 1983 action, a police officer is absolutely immune from liability for testimony given as a witness in the course of his official duties. Instead, I would clothe police officers who testify within the scope of their duties with the good-faith, qualified immunity that they possess for their other official acts.

42 U.S.C. § 1983 provides that every person who acts under color of state law to deprive another of a federal right shall be liable to the injured person in an action at law, suit in equity, or other proper proceeding for redress. The language of § 1983 is silent with respect to immunities. It has been held, however, that Congress did not intend to eliminate all common law immunities when it enacted § 1983. *E. g., Wood v. Strickland*, 420 U.S. 308, 317, 95 S. Ct. 992, 998, 43 L. Ed. 2d 214 (1975); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *Clanton v. Orleans Parish School Bd.*, 649 F. 2d 1084, 1101 n. 20 (5th Cir. 1981). Yet because the extension of absolute immunity from § 1983 liability to state officials negates "pro tanto the very remedy it appears Con-

gress sought to create. . . . the [Supreme] Court has not extended *absolute* immunity to such officials in the absence of the most convincing showing that the immunity is necessary." *Imbler v. Pachtman, supra*, 424 U.S. at 434, 96 S. Ct. at 996-97 (White, J., concurring). The Court has granted absolute immunity to state legislators, *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), judges, *Pierson v. Ray*, 386 U.S 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), and prosecutors, *Imbler v. Pachtman, supra*, in order "to protect the decision-making process in which [the officials] are engaged." *Id.* at 435, 96 S. Ct. at 997.

The Supreme Court has refused, however, to clothe other state officials with absolute immunity, even though their duties require the exercise of much discretion and, in some circumstances, they would have been absolutely immune from liability at common law. *See Imbler v. Pachtman, supra* at 434, 96 S. Ct. at 996 — 97. Instead, the Court has extended only a good-faith, qualified immunity to school board members, *Wood v. Strickland, supra*, state executive officials, *Scheurer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), prison officials, *Procunier*

v. Navarette, 434 U.S. 555, 98 S. Ct. 855, 55 L. Ed. 2d 24 (1978), and police officers, *Pierson v. Ray*, *supra*. The rationale for according these state officials with immunity when they act in good faith and with a reasonable belief that their actions are lawful is to minimize the prospect that the threat of liability will deter such officials from exercising their discretion and performing their official duties, *Douthit v. Jones*, 619 F. 2d 527 (5th Cir. 1980), without totally undermining the purpose of § 1983, which is to provide a remedy to persons deprived of their federal rights by the abuse of official power.

Police officers have been accorded good-faith, qualified immunity from § 1983 liability for actions undertaken with the scope of their duties. *See, e.g., Pierson v. Ray*, *supra* (§ 1983 suit arising from false arrest and imprisonment); *Barker v. Norman*, 651 F. 2d 1107 (5th Cir. 1981) (§ 1983 action based on illegal search, seizure, and retention of property); *Vasquez v. Snow*, 616 F. 2d 217 (5th Cir. 1980) (§ 1983 suit permised on illegal search). So long as a police officer performs his duties in good-faith and with a reasonable belief that his actions are lawful, *Barker v. Norman*, *supra*, he is immune from § 1983

liability whether the alleged deprivation arises during the course of an investigatio, *Vasquez v. Snow*, *supra*, arrest, *Pierson v. Ray*, *supra*, or imprisonment, *id.* Such an immunity should also extend to a police officer who testifies within the scope of his duties. The discretion a police officer exercises in testifying as a witness is certainly no greater than that which he exercises in making an arrest or conducting a search. In fact, it is much less. "[A] witness, at least in theory, exercises no discretion in the performance of his duty to answer fully and truthfully all questions put to him, unless the requested information would be self-incriminating or would violate some other evidentiary privilege." *Briscoe v. LaHue*, 663 F. 2d 713, at 719 (7th Cir. 1981). Moreover, the adverse impact on the criminal justice system is no greater where the threat of liability inhibits a police officer from fully testifying than where it chills, for example, a police officer's investigative activities or propensity to arrest a suspect. Thus, in my judgment, police officers should not be afforded a greater immunity from liability when they testify at trial than when they engage in their other duties; they should be immune from § 1983 liability only if they testify in

good-faith and with a reasonable belief in the truthfulness of their testimony.

At common law, witnesses are afforded absolute immunity in order to free them from the prospect of civil liability, which may dissuade them from coming forward or from fully and freely testifying. The majority concludes that police officers are entitled to absolute immunity from § 1983 liability because the policies underlying absolute witness immunity at common law likewise countenance absolute immunity from § 1983 liability. In so reasoning, the majority has overlooked critical differences between public officials and other witnesses. Public officials, "who in any event face the possibility of liability for most of their official acts, who may be obligated to testify as an aspect of their official duties, and who are normally represented by government counsel in § 1983 actions," *Briscoe v. LaHue, supra*, are likely to be less intimidated than private citizens by the threat of a § 1983 action. Thus, the policy considerations that countenance absolute immunity for lay witnesses at common law do not apply with equal force in the context of a § 1983 action against a police official who testifies within the scope of

his duties. *Briggs vs. Goodwin*, 569 F. 2d 10, 18 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904, 98 S. Ct. 3089, 57 L. Ed. 2d 1133 (1978); *Burke v. Miller*, 580 F. 2d 108, 112 (4th Cir. 1978) (Winter, J. concurring). *See Hilliard v. Williams*, 516 F 2d 1344, 1349 (6th Cir. 1975), *vacated on other grounds*, 424 U.S. 961, 96 S. Ct. 1453, 47 L. Ed. 2d 729 (1976), *affirmed after remand*, 540 F. 2d 220 (6th Cir. 1976) (police officer liable under § 1983 for falsely testifying in a criminal trial).

One may argue that if we deny public officials absolute witness immunity from § 1983 liability, then we likewise must deny private citizens absolute witness immunity. *See Briscoe v. LaHue, supra*. Such is not the case. Private parties possess absolute witness immunity from § 1983 liability because the policies underlying common law witness immunity equally justify absolute immunity for private parties in the § 1983 context. Moreover, according different degrees of immunity to parties subject to § 1983 liability is nothing new. For example, in the nonwitness context public officials acting within the scope of their duties possess either an absolute or qualified immunity from § 1983 liability, while private parties who have con-

spired with the same officials to interfere with an individual's federal rights generally possess no immunity at all. *See Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

For the reasons given, I agree with the District of Columbia and Sixth Circuits and would hold that a public official, here a police officer, who testifies at trial within the scope of his duties possesses only a good-faith, qualified immunity § 1983 liability.

Opposition

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No. 81-1881

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EARL CHARLES,

Petitioner,

v.

F. W. WADE
AND
THE MAYOR AND ALDERMEN
OF THE CITY OF SAVANNAH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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EARL CHARLES,

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ON THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN ERROR

OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, is reported at 665 F. 2d 661 (5th Cir. 1982)

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 11, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent parts of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 as set forth in the petition.

QUESTION PRESENTED

Whether a police officer is absolutely immune from civil liability under 42 U.S.C. § 1983 for trial testimony given in a State Court Crimminal Trial.

STATEMENT OF THE CASE

Petitioner was arrested in the State of Florida and after a full hearing extradited to Georgia for trial under indictment for murder and armed robbery. He was convicted by a jury after a lengthy trial. Respondent Wade appeared only as a witness for the State in rebuttal.

After numerous delays an amended Motion for New Trial alleging newly discovered evidence was heard and a new trial granted. The District Attorney and the police conducted a complete reinvestigation, finding that a reasonable doubt existed. The District Attorney placed the indictments on the Dead Docket, released the Defendant and there has been no retrial.

After his release, Petitioner filed an action under 42 U.S.C. § 1983 against the then Chief of Police, several officers of the police department including respondent

F. W. Wade and the City of Savannah. All defendants except the City of Savannah and Respondent Wade were dismissed before trial.

The Trial Court directed a verdict in favor of the City but submitted the issue of fourteenth amendment violations to the jury. The jury returned a verdict for Respondent Wade. Petitioner appealed arguing that the trial courts instruction that a witness is immune from liability for testimony given in a trial was in error. The court below affirmed the Trial Court but remanded on other grounds.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH OTHER UNITED STATES COURTS OF APPEAL DECISIONS ON THE SAME MATTER.

All United States Courts of Appeals and the District Courts that have directly addressed the question have reached the same conclusion and held that a witness, in a § 1983 action is entitled to absolute witness immunity. Brawer v. Horowitz, 535 F.2d 830 (3rd Cir. 1976); Burke v. Miller, 580 F.2d 108 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979); Charles v. Wade, 665 F.2d 661 (5th Cir. 1982); Briscoe v. LaHue, 663 F.2d 713 (7th Cir. 1981); Myers v. Bull, 599 F.2d 863 (8th Cir. 1979), cert. denied, 444 U.S. 901 (1980); Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978); Bennett v. Passic, 545 F. 2d 1260 (10th Cir. 1976).

The witness, whether a police officer or not, is an essential participant in the judicial process. The court below found that it is clear that at common law a witness was absolutely protected from any suit arising from his testimony in a judicial proceeding and that the same immunity should be accorded a witness in a § 1983 action.

The court below and each of the Courts of Appeals have applied the tests as proscribed by this court, Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951); Imbler v. Pachtman, 424 U.S. 409 (1976); City of Newport v. Fact Concerts, Inc., 101 S.Ct. 2748 (1981); and after careful inquiry into considerations of both history and policy concluded that the public policy is best served by granting absolute witness immunity.

Petitioner cites Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), cert. denied, 437

U.S. 904 (1978) and Hilliard v. Williams,516 F.2d 1344 (6th Cir. 1975), vacated on other grounds, 424 U.S. 961 (1976), affirmed after remand, 540 F.2d 220 (6th Cir. 1976). Both are clearly distinguishable. The majority in Briggs, supra, in response to a vigorous dissent by Judge Wilkey expressly disclaimed so holding. The defendant in Briggs, supra, claimed immunity as prosecutor, not as witness, he only responding to a single question by the court. Nevertheless this holding prompted the lengthy treatise on the subject in the dissent by Judge Wilkey. Briggs v. Goodwin, supra, 569 F.2d at 29-61.

In Hilliard, supra, the perjured testimony was given at the direction of the prosecuting attorney in a conspiracy to get a conviction. Justice White cited Hilliard, supra, in his concurring opinion in Imbler v. Pachtman, supra, 424 U.S. at 443 as holding that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties

constituting an integral part of the judicial process".

The decision of the court below is in harmony with the decisions in other United States Circuit Courts of Appeal.

II.

THE ISSUE HAS BEEN DETERMINED BY THIS COURT.

In his concurring opinion in Imbler v. Pachtman, 424 U.S. 409 at 439-440, Justice White discussed the issue of absolute witness immunity.

> For a witness, this means he must be permitted to testify without fear of being sued if his testimony is disbelieved....Of course, witnesses should not be encouraged to testify falsely....However, if the risk of having to defend a civil damage suit is added to the deterrent against such conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self-censorship becomes too great.

In Butz v. Economou, 438 U.S. 479 (1978) at 512, again Justice White for the Court included witnesses.

The cluster of immunities protecting the various participants in judge supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested, 13 Wall., at 348-49, controversies sufficiently intense to erupt in litigation are not easily capped by judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See Pierson v. Ray, supra, 386 U.S., at 554. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

At the same time, the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and

the penalty of perjury. Because these features of the judicial tend to enhance the reliability of information and the impartiality of the decision-making process, there is less pressing need for individual suits to correct constitutional error. (Emphasis added.)

In the recent case of City of Newport v. Fact Concerts, Inc., supra, 101 S.Ct. at 2755, this court held..

> It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vaccuum. In the Civil Rights Act of 1871, Congress created a federal remedy against a person who, acting under color of state law, deprives another of constitutional rights. Congress, however, expressed no intention to do away with the immunities afforded state officials at common law, and the Court consistently has declined to construe the general language of § 1983 as automatically abolishing such traditional immunities by implication. Instead, the Court has recognized immunities of varying scope applicable to different officials sued under the statute. The important assumption underlying the Court's decisions in this area is that members of the 42nd Congress were familiar with common law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common law principles to obtain, absent specific pro-

visions to the contrary. (Citations and footnotes omitted.)

The Court in Owen v. City of Independence, 445 U.S. 622 (1980) found no tradition of immunity for municipal corporations though reciting that notwithstanding the expansive language of § 1983, traditional common law immunities have been preserved.

> In each of these cases, our finding of § 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Imbler v. Pachtman, supra, 424 U.S., at 421. Where the immunity claimed by the defendant was well-established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purpose of the Civil Rights Act, we have construed the statute to incorporate that immunity.

III.

THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

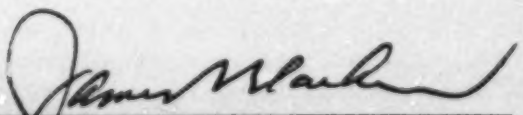
Petitioner's reliance on Pierson v. Ray, 386 U.S. 547 (1967) is misplaced. Butz v. Economou, supra, 438 U.S. at 511-512.

A police officer testifying in any court does so in response to the order of the respective court. In this respect he is no different than any other witness. His testimony is presented not under the color of his office but as any other witness. Myers v. Bull, 599 F.2d 863 (8th Cir. 1979), cert. denied, 444 U.S. 901 (1980).

CONCLUSION

For the foregoing reasons, the Petition for A Writ of Certiorari should be denied.

Respectfully Submitted,



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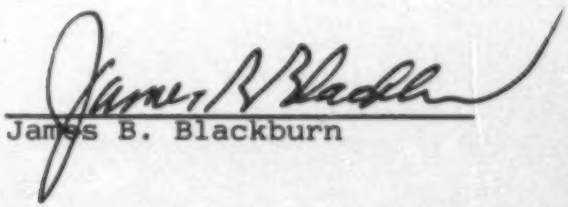
CERTIFICATE OF SERVICE

I, James B. Blackburn, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 11 day of May, 1982, I did serve copies of this petition on Petitioner, by placing in the United States Mail, first class postage prepaid, three copies properly addressed to the counsel of record for Petitioner, as follows:

Dennis N. Balske
1001 S. Hull Street
P. O. Box 2087
Montgomery, AL 36103-2087

I further certify that I have served all parties required to be served.



James B. Blackburn